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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FREE RANGE CONTENT, INC., a California corporation, COCONUT ISLAND SOFTWARE, INC., a Hawaii corporation, TAYLOR CHOSE, a Minnesota resident, and MATTHEW SIMPSON, a British Columbia, Canada resident, on behalf of themselves and all others similarly situated.

No. 5:14-cv-02329-BLF

PLAINTIFFS' MEMORANDUM IN
RESPONSE TO GOOGLE INC.'S
OBJECTION OF NOVEMBER 16, 2015

Plaintiffs.

V.

GOOGLE INC., a Delaware corporation,

Defendant.

1 Plaintiffs respectfully submit this memorandum in response to Google Inc.'s objection to
 2 their opposition to its pending motion to dismiss, Dkt. No. 100.

3 Plaintiffs did not intend to violate any part of the Court's revised standing order of October
 4 21, 2015. Rather, plaintiffs worked hard to keep their opposition to Google's motion to dismiss as
 5 concise and readable as possible, and they believe that they accomplished that goal. But there was
 6 much to address. Again, Google has moved to dismiss all four plaintiffs' seven claims, with even
 7 more cited authorities than before. In its previous motion, Dkt. No. 38, Google cited to 59 cases,
 8 whereas in its current motion, it cited to even more: 63 cases (Dkt. No. 94). Yet this time, plaintiffs
 9 had less pages with which to respond: 25 pages this time, versus 30 pages the last time. (Dkt. No.
 10 34.)

11 Furthermore, Google again submitted copious exhibits with its motion, including the Wong
 12 Declaration, which includes 32 exhibits, and which consists of a total of 190 pages, not counting
 13 exhibit number pages. It also re-submitted the Gray Declaration, which includes 12 more exhibits,
 14 and which consists of 48 pages, not including exhibit number pages. And this is all with respect to a
 15 motion to dismiss, where factual determinations are impermissible. In fact, Google re-submitted all
 16 of this material (three exhibits are new) even after the Court said at the hearing on its previous motion
 17 to dismiss: "I don't think they [the proffered exhibits] are that relevant at the level of review I am
 18 giving the matter now." (Dkt. No. 77 (Trans. of Feb. 12, 2015 hearing) at 3-4.) Google must not,
 19 either, because it does not cite to page numbers of these many exhibits (though it marked a few), and
 20 most pages are junk excerpts that it says nothing about whatsoever.

21 But some of Google's extraneous materials required the significant use of space for plaintiffs
 22 to unravel and rebut. In particular, plaintiffs expended over three-and-a-half pages responding to
 23 misleading characterizations of the record, and groundless assertions, that Google had made with
 24 respect to them. (*Cf.* Resp. to MTD (Dkt. No. 99) at 4-7 *with* MTD (Dkt. No. 94) at 5-7, 8-9.)
 25 Although Google's assertions of contested fact are improper on a motion to dismiss, nonetheless,
 26 some called out for detailed responses.

27 While drafting plaintiffs' opposition brief, counsel for plaintiffs was unaware that the Court
 28 had revised its standing order to provide that footnotes should be used "sparingly." There was no

1 intention to violate this provision or any other, including the proviso that “citations to textual matter
 2 shall not be contained in footnotes.” (As to the latter proviso, it appears that Google violated it by
 3 way of its nn. 1 and 21. (MTD at 3, 19.).) Rather, plaintiffs’ intention was to address all of Google’s
 4 arguments concisely but thoroughly, in response to its motion to dismiss plaintiffs’ entire case.

5 Civility on Google’s part would have gone a long way. Had counsel for Google picked up
 6 the telephone and called counsel for plaintiffs—which counsel for Google did not—the parties might
 7 well have worked-out Google’s objection short of these additional filings. For example, Google
 8 could have requested a few more pages in reply, or a reasonable extension of time (the hearing is not
 9 until February 18, 2016, per the current schedule). The parties could have presented any such
 10 accommodation to the Court as a proposed stipulation, with plaintiffs advising that certainly they
 11 would revise their brief if requested by the Court.

12 In conclusion, plaintiffs did not intend to violate any aspect of the Court’s revised standing
 13 order. Google claims no prejudice, and it could demonstrate none if it did. Plaintiffs will bear the
 14 revised rule regarding footnotes in mind going forward, as well as the rest of the Court’s standing
 15 order. They respectfully ask that Google’s objection be overruled.

16 DATED: November 16, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2015, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the email addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List, and I hereby certify that I have caused to be mailed a paper copy of the foregoing document via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List generated by the CM/ECF system.

Dated: November 16, 2015

/s/ Robert F. Lopez

Robert F. Lopez